Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 03-57
FM Table of Allotments, FM Broadcast Stations	)	RM-10565
(Ft. Collins, Westcliffe and Wheat Ridge, Colorado)	)	

TO: Full Commission

APPLICATION FOR REVIEW

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SUMMARY

This proceeding involves a counterproposal by MGI to allocate Channel 248C to the community of Creede, Colorado, where it will provide a first local broadcast outlet for self-expression while, at the same time, serving significant areas and populations which currently have either no aural reception service, or only one reception service. MGI's Counterproposal is in conflict with an application by Clear Channel for a minor change in the facilities of FM Broadcast Station KRFX, Denver, Colorado. That application is defective, *i.e.*, it requires a waiver of the Commission's Rules. The staff erroneously denied MGI's Counterproposal because of the conflict with the KRFX application. Notwithstanding the fact that that application is defective and violates the Commission's Rules.

Additionally, the staff twice ignored a suggestion advanced by MGI for a site restriction, which would have enabled the Counterproposal to be adopted, even if the KRFX application was granted in its present form.

TABLE OF AUTHORITIES

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APPLICATION FOR REVIEW

Pursuant to §1.115 of the Commission's Rules and Regulations, 47 C.F.R., §1.115, Meadowlark Group, Inc. (hereinafter "MGI"), by its attorney, hereby respectfully requests the Full Commission to review and set aside the *Memorandum of Opinion and Order*, released in this proceeding by the Audio Division on August 9, 2004, which denied reconsideration of the Audio Division's earlier *Report and Order*,[1] which denied MGI's Counterproposal to allot Channel 248C to the community of Creede, Colorado, and also denied MGI's Motion to Consolidate the proceedings in this docket with the proceedings involving the application of Jacor Broadcasting for a change in the facilities of FM Broadcast Station KRFX, Denver, Colorado.[2] In support thereof, it is alleged:

I. Statement of Facts

1. Under date of May 2, 2003, MGI filed Comments and a Counterproposal (hereinafter "MGI's Counterproposal" or "Creede Counterproposal") in this proceeding. In its

[1] *Fort Collins, Westcliffe, and Wheat Ridge, Colorado*, 19 FCC Rcd 4821 (MB 2004).

[2] See, *Reclassification of License of Station KRFX, Denver, Colorado*, 18 FCC Rcd 3220 (MB 2003) and Jacor's subsequent application (File No. BPH-20030424AAO), which purports to specify full Class C facilities for Station KRFX.

Counterproposal, MGI proposed to allocate Channel 248C as a first local service to the community of Creede, Colorado. MGI showed that Creede is an incorporated community of 377 persons, located in the mountains, approximately 265 miles southwest of Denver, governed by a Mayor and 7 councilmen, together with a City Manager. It is the county seat for Mineral County (pop. 831), and the county courthouse is located there, as well as the other county offices.

2. Additionally, MGI showed that the proposed Creede station will serve a "white area" of 1,803 square kilometers, which presently receives no aural broadcast service, whatsoever, and that the white area contains a population of 137 persons. Finally, MGI showed that the Creede allotment will also serve a large "gray area" where only one reception service is currently available.

3. MGI's Counterproposal requires that Station KRFX, Denver, Colorado, which is owned by Clear Channel Broadcasting Licenses, Inc. (hereinafter "Clear Channel"), and licensed to Jacor Broadcasting of Colorado, Inc. (hereinafter "Jacor"), be downgraded from a Class C facility to a Class C0 facility. MGI acknowledged that downgrading of an existing station cannot be proposed in a counterproposal, but MGI pointed out that Jacor had already responded to an Order looking toward reclassification of Station KRFX, Denver, Colorado, as a Class C0 facility. *Reclassification of License of Station KRFX, Denver, Colorado*, 18 FCC Rcd 3220 (MB 2003) (hereinafter the "Show Cause Order").

4. As it happened, on April 24, 2003, before MGI's Counterproposal was filed, Jacor filed an application (File No. BPH-20030424AAO) (the "Jacor Application") and, by letter from Counsel, specifically identified the application as responsive to the Show Cause Order. The Jacor Application sought a waiver of the fundamental requirement imposed by the Show Cause Order, which instructed that Jacor raise the KRFX antenna to provide service commensurate with

Class C facilities or be downgraded to Class C0. Instead of increasing the antenna height, the Jacor Application sought to actually lower it. Absent the grant of a waiver, the Jacor Application was defective because it violated §73.313(d)(1) of the Commission's Rules and Regulations .[3] MGI relied upon Counsel's letter identifying the Jacor Application as responsive to the Show Cause Order, as it sought dismissal of another petition for a new service at Akron, Colorado. MGI assumed that the waiver request to be excused from compliance with the Show Cause Order would have to be "carefully considered" [4] against the Akron proposal and against its Creede Counterproposal.

5. In an Informal Objection, filed under date of May 24, 2004, MGI showed that Jacor's KRFX does not have and has never had a so-called "Denver Waiver." The KRFX existing licensed facility has height above average terrain calculated in the manner prescribed in the Rules, properly using 8 radials. MGI further showed that there was absolutely no public interest benefit to be achieved by allowing Jacor's engineers to exclude inconvenient radials for the purpose of calculating height above average terrain.

6. Nevertheless, on March 19, 2004, the Audio Division released a *Report and Order* denying the Creede Counterproposal on the grounds that it conflicted with the prior-filed Jacor Application. *Ft. Collins, Westcliffe, and Wheat Ridge, Colorado*, cited *supra.* MGI promptly sought reconsideration of the staff action, and also filed a Motion to Consolidate the proceedings involving the Jacor Application with the proceedings in this docket, involving the

[3] 47 C.F.R. §73.313(d)(1) requires that height above average terrain be calculated by drawing profile graphs for 8 radials, beginning at the antenna site and extending 16 kilometers therefrom. Jacor's engineers did not do that. Instead, they drew only 4 radials, electing to exclude radials over higher terrain. The effect of this exclusion was to make the antenna height above average terrain, specified in the application, appear considerably greater than the actual antenna height above average terrain, calculated in the manner prescribed by the Rules. Jacor's engineers requested a so-called "Denver Waiver" to allow them to cherry-pick the radials which they chose to include in their calculations, and to exclude inconvenient radials.

[4] Srreamlining citation here

counterproposal to allot the channel to Creede. By *Memorandum of Opinion and Order*, released August 9, 2004, the Audio Division denied MGI's Petition for Reconsideration, and also denied MGI's Motion to Consolidate. Thus, the Creede Counterproposal was denied because of a conflict with a pending application, even though that application, absent the grant of a controversial waiver, is, on its face, defective and in violation of the Rules. MGI appeals.

II. Questions Presented for Review

7. §1.115(b)(1) of the Commission's Rules require that an Application for Review shall concisely state the questions presented for review. In this case, the fundamental questions are as follows:

> a. Where an application for a minor change by an existing station requires a non-routine waiver of the FCC's Rules, and a timely Informal Objection was filed against the application, demonstrating that there was no basis to grant the waiver, and where such an application was mutually exclusive with a proposed rulemaking to allot a first local broadcast service to an independent community of substantial size (and which would also provide first and second reception services to significant numbers of people), did the staff err when it denied the rulemaking without first deciding whether or not to grant the waiver and application?
>
> b. Where MGI suggested that the Creede Counterproposal could be granted, even if KRFX was treated as a full Class C facility, provided only that a site restriction be placed on the proposed channel substitution at Poncha Springs, CO., did the staff err when it simply ignored the alternate site?

III. Other Procedural Matters

8. §1.115(b)(2) of the Commission's Rules and Regulations requires that the application for review specify the factors which warrant Commission consideration of the questions presented. In this instance, the questions presented involve unique issues, never before decided by the full Commission, *i.e.*, the question of how to compare a meritorious

counterproposal with a conflicting, but defective, minor change application and the manner the order in which Staff processing impacts "cutoff" protection.

9. Next, §1.115(b)(3) requires the applicant for review to state with particularity the respects in which actions taken by the delegated authorities should be changed. Here, the staff decision denying MGI's Counterproposal should be reversed and the Counterproposal should be adopted.

10. Further, §1.115(b)(4) requires an applicant for review to state the form of relief sought, and subject to this requirement, the Applicant may specify alternate requests for relief. In this instance, MGI respectfully requests that the Jacor Application be denied, or granted at the appropriate class of facility, with HAAT calculated in accordance with the Rules, and that MGI's Counterproposal to allocate Channel 248C to Creede, Colorado be adopted. Alternatively, MGI requests that the Jacor Application and the required waiver request be judged as to public interest merit in the context of §307(b). If neither of the foregoing is acceptable, MGI requests that a site restriction be placed on the channel substitution at Poncha Springs, Colorado, to enable the Creede Counterproposal to be adopted, even if the Jacor Application is treated as a full Class C facility.

11. Finally, §1.115(d) provides that an applicant for review must be filed within 30 days of the public notice of an action. Action in this case was taken by *Memorandum of Opinion and Order*, released August 9, 2004, and this Application for Review is being timely filed within 30 days of that action.

IV. Argument

A. Procedural Error

12. The staff put the cart before the horse. If processed in the order received, the Jacor Application would have come up first, because it was filed prior to the filing of MGI's Counterproposal. At the time of the staff's original action denying the MGI Counterproposal, the permitted six months for filing an application had expired[5]. Earlier in this proceeding, the staff demonstrated that they can act very swiftly and efficiently on pending applications; in fact, the Jacor Application was actually granted, albeit by error, 25 days after it was filed. Yet, in this instance, the staff elected to act on the rule making prior to acting on the application. This, in itself, is illogical.

13. What the staff did in this case was to treat MGI's Counterproposal in a vacuum without considering the merits or lack of merits of the Jacor Application. In the application proceeding, MGI has filed an Informal Objection, demonstrating that the Jacor Application requires a brand new waiver[6] of the Commission's Rules; specifically, the rule that governs the height above average terrain. MGI has further shown that there is no basis for a grant of the waiver and that, absent a waiver, the application in its present form cannot be granted.

14. By bifurcating this proceeding into a separate rulemaking proceeding dealing with the Creede Counterproposal, and providing for the required "careful consideration" of the Jacor Application only at a later date, the staff has committed a grave procedural error. In *Ashbacker*

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[5]In order that there be no doubt of Jacor's reliance upon a waiver of the height rules, on April 25, 2003 counsel for Jacor tendered a letter identifying KRFX's application [BPH-20030424AAO] as specifically in response to the Order to Show Cause in RM-10630 and seeking such a waiver.

[6] In a further Supplement to Informal Objection, filed in the application proceeding under date of July 14, 2003, MGI showed that KRFX has never had a height waiver – that its licensed HAAT was calculated using the method prescribed in the Rules. Specifically, the earliest available application for a construction permit for Station KRFX (File No. BPH-6817) was filed in October, 1968, by General Electric. It contemplated the use of the KOA-TV tower on Lookout Mountain, and specified a height of the radiation center of the antenna of 7689 feet (2344.2 meters). The transmitter site has never been moved; it is still on the KOA-TV tower, which is now owned by CBS. The coordinates of the tower have changed, very slightly, but this appears to have been the result of a simple correction, not a physical re-location.

Radio Corporation v. FCC, 326 U.S. 327 (1945), the Commission was dealing with two conflicting applications for construction permits. The Commission elected to grant one of the applications and pronounced that it would consider the other application in a hearing at a later date. The Supreme Court held this to be error. Interpreting the intent of Congress, the Court held that the conflicting applications had to be considered in a *consolidated* proceeding. One could not be considered without also considering the other. The same is true here: the rulemaking cannot be considered without also considering the merits of the application and waiver; and the merits of the application and waiver cannot be considered without also considering the merits of the Counterproposal. This is especially so because the two matters are being processed by the same division of the Commission. The staff's effort to distinguish the *Ashbacker* case (*Report and Order* at n.7) is unavailing. It is a distinction without a difference. It is true that *Ashbacker* involved competing applications and not rulemakings. However, when *Ashbacker* was decided in 1945, the Commission had not begun to use rulemaking proceedings to satisfy its responsibilities under §307(b) of the Act. The *Ashbacker* Court simply decided that Congress intended that, where there were two conflicting proposals, the proposals had to be considered in a consolidated proceeding.

15. When, in the Balanced Budget Act of 1997[7], Congress converted the awarding of licenses from the system based on hearings to a system based on auctions, Congress could have abolished §307(b) of the Act, and provided that, where there were two competing proposals, the proponent paying the most money would be awarded the allotment. Congress, however, did not do that. It left §307(b) intact, thereby providing for continued comparison of competing

[7] P. L. 105-33, August 5, 1997.

proposals for different communities.[8] Clearly, Congress did not care whether those proposals were advanced in an application or in a rulemaking, or Congress would have said so. For this reason, it is not an answer to say, as the staff does in the *MO&O* on reconsideration, that if the Jacor Application is ultimately denied, MGI can always file another rulemaking to allocate Channel 248C to Creede. In the first place, when and if that happens, the constellation of allotments may have changed, and Channel 248C may no longer fit at Creede. Even more importantly, however, MGI should not have to assume the burden of contesting the Jacor Application in a standalone proceeding. The application proceeding and the rulemaking proceeding are inextricably intertwined, and must be considered on a consolidated basis. *Ashbacker*, cited *supra.*

16. *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) is also relevant. There, the Commission was considering whether to renew the license of an AM broadcast station in Baton Rouge, Louisiana. There was pending before the Commission an application to sell the radio station to a third party. The Commission elected to deny the license renewal and dismiss the transfer application on the grounds that there was no license to transfer. Here, again, the Court of Appeals held that this was error; that the renewal and transfer applications had to be considered together. Where, as here, the FCC exalts form over substance, it almost always results in reversal on appeal. *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir., 1999).

17. The Creede rule making proceeding involves the Commission's mandate to allocate frequencies in a fair, efficient and equitable manner, pursuant to the provisions of Section 307(b) of the Communications Act. That mandate is primal and takes precedence over

[8] Following the conversion to an auction-based system, the FCC continues to forego the use of auctions in cases involving applications for different communities. Instead, it compares the relative needs of the communities, pursuant to the mandate of §307(b). *Peoples Broadcasting Network, Inc.*, FCC 04-143, 2004 WL 1375275 (2004).

everything else. Thus, when licenses were awarded through a system of hearings, and there were various applications for different communities, the Commission was required to first consider which community needed the service most and only then determine which of the applicants for that community was the most qualified. *Allentown Broadcasting Corp. v. FCC*, 349 U.S. 358 (1955). Even today in the auction milieu, where there are multiple applications for different communities, the Commission must first determine which community needs the service most and only then proceed to auction the allotment to the applicants specifying that community.

18. By considering the Creede Counterproposal in a vacuum and ignoring the merits or lack of merits of the Jacor Application, the staff deprived itself of the opportunity to make the determination required by Section 307(b) of the Act. That resulted in a substantive error as well, because as we will demonstrate the Jacor Application cannot be granted in its present form. Yet, by simply assuming otherwise, the staff was led to deny an allotment which would have provided a first local service to a community of substantial size and also provide service to significant white or gray areas.

B. The Staff Should Not Have Assumed that the KRFX Application Is Acceptable, Because It Is Not Acceptable

19. The staff refers to the Jacor Application as "acceptable." This is a quibble. The application violates the FCC's Rules. Therefore, it is not acceptable unless the Rules are waived, which has not occurred in this case.

20. The Jacor Application purports to upgrade Station KRFX from a Class C0 facility to a full Class C facility. In fact, it does no such thing. The application actually contemplates a reduction in antenna height area and population served by the station as compared with the height area and population served by the existing KRFX facility.

21. The application for the existing licensed KRFX facility (BPH-6817) made it very clear that HAAT was calculated using the standard eight radial method and was found to be 1045 feet (319 meters). The area and population served by these facilities comes to 16,210 square kilometers, containing a 2000 population of 2,710,518 persons.

22. The center of radiation shown for the antenna in the Jacor Application is 2256 meters above mean sea level ("AMSL"), which is 78 meters *lower* than the center of radiation AMSL for the existing licensed KRFX facilities, approximately 2334 meters.[9] In fact, the HAAT from the proposed facilities in the Jacor Application, calculated using the standard eight radial method, turns out to be 238 meters. These proposed facilities will serve an area of 12,730 square kilometers, containing a 2000 population of 2,596,399 persons. Thus, the proposed facilities will serve a smaller area and population than KRFX serves at the present time. Under these circumstances, Jacor's self-serving contention that the proposed facilities should be treated as an "upgrade" to full Class C status is simply absurd. Grant of the Jacor Application will reduce "careful consideration" to an endorsement of the idea that down is actually up.

C. The Staff Should Have Examined The Merits of the Waiver Request and the Jacor Application First

23. MGI appreciates the concerns of the Staff as to the processing of applications and petitions. By attributing cutoff protection to minor modifications instantly upon filing, the routine granting of applications and petitions is greatly facilitated and improved service to more people is instituted more quickly. But administrative convenience cannot ride roughshod over

[9] The FCC data base gives a figure of 2142 meters for the height AMSL of the existing facilities but this is obviously an error, since KRFX is still on the same tower that it was on in 1968, and the tower has not moved or been reduced in height.

the Commission's principle mission, the fair distribution of facilities among communities. Here, this is exactly what has happened.

24. Jacor's response to the Show Cause Order was, in effect, to request a "pass" on the requirement set out in the Order. While Jacor is entitled to request a waiver, the Commission is not obligated to grant one, nor is Jacor entitled to assume one will be granted.

25. If Jacor cannot assume it is entitled to a waiver automatically, Jacor must have tendered its Application expecting that the waiver would be weighed against the allotment merit of competing proposals. At the time the Jacor Application was filed, only the new allotment at Akron was at issue. Jacor likely presumed it would prevail, perhaps by proposing an alternate channel for Akron. Jacor could not have foreseen MGI's counterproposal, which brings service to "white area."

D. The Commission Can And Should Grant The KRFX Application, But Not As A Full Class C Facility

26. The Jacor Application has two aspects: It seeks a change in transmitter site and it seeks a change to full Class C facilities. (Jacor claims that it is an "upgrade" but, as demonstrated, the proposed facilities serve less area and population than the existing KRFX licensed facility and, accordingly, the term "upgrade" is a misnomer.)

27. At paragraph 6 of the *MO&O* on reconsideration, the staff indicates that if the Jacor Application is denied, the Creede Counterproposal can be resubmitted and granted. There are two problems with this observation. First, by the time the Jacor Application has been finally denied, the constellation of allotments may have changed, and Channel 248C may no longer "fit" at Creede. Second, and even more important, the issue is not whether the application should be granted; it should. The issue is whether it should be granted as a Class C facility, based upon a

waiver or whether it should be granted in accordance with the Rules, which makes it a Class C1 facility. In either case, *the actual height, power and coverage for KRFX will be exactly the same.* The FCC staff apparently confused the aspect of the Jacor Application, which relates to the change of transmitter site, with the quite different and separate issue of Class C height requirements.

28. MGI does not oppose a grant of the application insofar as it pertains to a change of transmitter site. MGI's opposition is confined to the arbitrary determination of class without requisite antenna height. That change requires a waiver of an important Commission rule, *i.e.*, the rule governing the calculation of HAAT. Jacor has failed to make the case for waiver. Therefore, the application to change transmitter site should be granted, but the station class should be assigned by the method set out in the Rules which, in this case, defines KRFX as a Class C1 facility.

29. In a pleading filed by MGI under date of June 6, 2003,[10] MGI showed that the Creede Counterproposal could be granted, even if KRFX was considered to be a full Class C facility, simply by imposing a site restriction on the channel substitution at Poncha Springs, Colorado. The staff not once, but twice, ignored this suggestion. This, too, was error. Suggestions to specify a different transmitter site can be and have been accepted, long after all comments and replies have been received. *Crisfield, MD*, DA 04-2394, released July 30, 2004.

V. Conclusion

30. For the reasons set forth above, the staff committed both procedural and substantive errors. The staff decision must be reversed and set aside, and MGI's Counterproposal to allocate Channel 248C to Creede, Colorado must be adopted.

[10]Meadowlark Group, Inc.'s, Response to Jacor's Reply Comments.

Respectfully submitted,

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August 27, 2004

By: _____
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CERTIFICATE OF SERVICE

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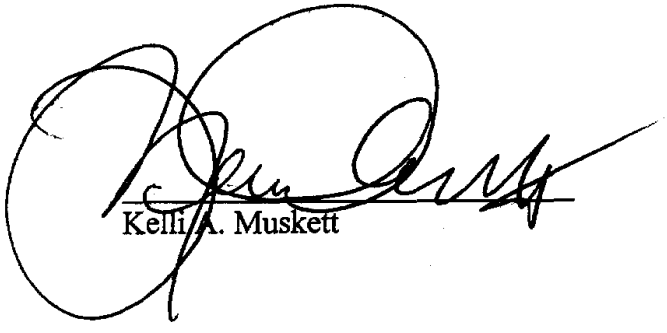

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